



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2001 SEP -5 P 2:15

SEP - 5 2001

VIA CERTIFIED MAIL

Allison R. Hayward, Esquire
Bell, McAndrews, Hiltachk & Davidian
455 Capitol Mall, Suite 801
Sacramento, CA 95814

SENSITIVE

RE: MUR 4919
Charles Ball for Congress
Justin Briggs, as treasurer

Dear Ms. Hayward:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, on August 17, 1999, the Commission found reason to believe that persons unknown knowingly and willfully violated 2 U.S.C. 441d(a) by financing communications without a disclaimer. It was subsequently discovered that the communications were financed by Charles Ball for Congress ("Ball campaign"). On August 23, 2000, the Commission found reason to believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. § 441h, and notified the Ball campaign of the Commission's earlier Section 441d(a) finding. The Commission also found reason to believe that Justin Briggs, as the committee's treasurer, violated 2 U.S.C. §§ 441d(a) and 441h.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. §§ 441d(a) and 441h, and probable cause to believe that Justin Briggs, as the committee's treasurer, violated 2 U.S.C. §§ 441d(a) and 441h.

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

MUR 4919

Letter to Allison Hayward, Esquire

Page 2

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

Should you have any questions, please contact Xavier K. McDonnell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lois G. Lerner
Acting General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Charles Ball for Congress
Justin Briggs, as treasurer

)
)
)
) MUR 4919
)
)
)

GENERAL COUNSEL'S BRIEF

I. BACKGROUND

MUR 4919 was generated by the Federal Election Commission ("Commission"), pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities. 2 U.S.C. § 437g(a)(2). The matter involves approximately 40,000 fraudulent mailers and 10,000 phone calls to registered Democrats in California's 10th Congressional District. The communications were put out under the heading of a fictitious organization called the East Bay Democratic Committee, and "George Miller," which is the name of a well-known Democratic Congressman who represents part of the East Bay. The communications expressly advocated the defeat of Representative Ellen Tauscher, who was running against Republican candidate Charles Ball in the 1998 Congressional election. The anti-Tauscher letters and phone calls did not contain any disclaimers stating who paid for them or whether they were authorized by any candidate or committee.

On August 17, 1999, the Commission found reason to believe that persons unknown knowingly and willfully violated 2 U.S.C. 441d(a) by financing the communications without a disclaimer. It was subsequently discovered that the communications were financed by Charles Ball for Congress ("Ball campaign"). On August 23, 2000, the Commission found reason to

believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. § 441h, and notified the Ball campaign of the Commission's earlier Section 441d(a) finding. The Commission also found reason to believe that Justin Briggs, as the committee's treasurer, violated 2 U.S.C. §§ 441d(a) and 441h.

After completing its investigation in this matter, the Office of General Counsel is prepared to recommend that the Commission find probable cause to believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. §§ 441d(a) and 441h, and probable cause to believe that Justin Briggs, as the committee's treasurer, violated 2 U.S.C. §§ 441d(a) and 441h.

II. STATEMENT OF THE CASE

A. The Facts

In the November 3, 1998 Congressional general election, Democratic Representative Ellen Tauscher ran against Republican candidate Charles Ball in California's 10th Congressional District. During 1998, the Ball campaign hired Michael Mihalke of Brabender Cox as its general consultant. At Mr. Mihalke's recommendation, Adrian Plesha was hired as the campaign's manager. Christian Marchant was hired as deputy campaign manager and Heather Patterson as finance director. Stevens Printing ("Stevens") was the campaign's major printing firm. Stevens retained Ireland Direct Mail ("Ireland") as its mail-house for most Ball campaign services. The Ball campaign retained Direct Impact Marketing Services ("Direct Impact") for phone banks.

In early October of 1998, Representative Tauscher voted to expand the impeachment inquiry of President Clinton. At that time, polls conducted in California's 10th District showed Tauscher with a 2-to-1 lead over Ball, who had not advanced much from the 24 percent of the vote he drew in the primary. *San Francisco Gate*, October 10, 1998. A Ball campaign videotape

of various television news interviews on October 8, 1998, shows Charles Ball using Tauscher's impeachment vote as a campaign issue. In the interviews, Ball states that Tauscher's position on Clinton and the impeachment issue showed Tauscher's "extreme vulnerability." KGO News, Channel 7, October 8, 1998. Ball also stated that the "credibility of our candidacy is enhanced by virtue of the fact that the President is having difficulties." *Id.* A document found on a Ball campaign computer, created on October 9, 1998, contained several quotations from Tauscher and statements to suggest she had politicized the impeachment issue.

On October 31, 2001, just three days before the election, thousands of mailers were sent to Democratic households in California's 10th Congressional District. The one-page letter was type-written on the personalized letterhead stationery of the "East Bay Democratic Committee," a non-existent entity that purported to be a local party committee. It contained a fraudulent address, and carried the name George Miller at the end as "East Bay Democratic Chairman." George Miller represents a neighboring congressional district and is a strong supporter of Tauscher. Miller publicly denounced the mailer and denied any involvement.¹ The letter urged Democrats not to vote for Tauscher, yet contained no disclaimer identifying who paid for the mail piece or whether it was authorized by any candidate or committee. It also focused on

¹ Representative George Miller from California (D-7) and the California Democratic Party brought suit in state court against candidate Charles Ball, his campaign committee, the Charles Ball for Congress Committee, and Adrian Plesha alleging they should have stopped the fraudulent campaign mailer and phone operation. The suit was voluntarily dismissed.

Tauscher's vote to "launch an Impeachment Inquiry" of President Clinton. The text of the letter is reproduced below:

EAST BAY DEMOCRATIC COMMITTEE
"Representing all Democrats in the East Bay"
1960 John F. Kennedy Dr.
Antioch, CA 94509

IMPORTANT MESSAGE!

November 1st, 1998

Dear fellow Democrat,

Election day is drawing near and it is crucial that we support the Democratic team. The Republican party and big business will stop at nothing to derail our positive agenda for working families.

Each year we provide you with the slate of our Democratic team we are supporting. This year we have done the same for all major candidates in the East Bay who have been supportive of our President, Bill Clinton, and the goal of our party including 100,000 new teachers, a Patients Bill of rights and protection of Social Security.

However, as loyal Democrats, we find it very troubling that Rep. Ellen Tauscher abandoned President Clinton and the Party when she voted with the Republicans to launch an Impeachment Inquiry in the personal life of a truly great President who has accomplished so much for the Democratic Party and working families.

It is with great regret that we will not be supporting the re-election of Rep. Ellen Tauscher because of her votes against the President and against our Party. Her voting with the Republicans on issues such as the impeachment inquiry, stealing from Social Security for tax cuts for the rich and minimum wage make her unacceptable to us.

We know that many Democrats have chosen to send her a message by not voting for her or against her on November 3rd because of her abandonment of the party. They have chosen simply not to vote for either candidate in the race for Congress.

And while we have chosen not to forget how Ellen Tauscher turned her back on our party we ask that you remember to support our Democratic team for the other offices on the ballot on Election Day. Unfortunately, we have been left with no choice but to send Ellen Tauscher a message. Because she abandoned us, we are abandoning her.

We could not support her opponent. And Ellen Tauscher will win re-election. But it is critical that she receive the message loud and clear. She must support our President to enjoy our support. Not voting for her is the best way for her to receive this message.

Thanks for remembering to support our other loyal Democrat candidates on the ballot on Tuesday.

Sincerely,

George Miller
East Bay Democratic Chairman

Additionally, on the same day the mailing was received, thousands of registered Democrats in the 10th Congressional district received phone calls from persons claiming to be from the "East Bay Democrat Committee." The calls contained a message similar to the mailings and urged voters not to vote for Ellen Tauscher. Some of the persons who received the calls and mailers complained about them to local authorities.

Press reports indicate that Charles Ball and his campaign manager, Adrian Plesha, denied any involvement in the "East Bay Democratic Committee" communications. *Contra Costa Times*, November 2, 1998. Adrian Plesha was quoted as saying "[i]t's not coming from this campaign." *Id.* Responding to Tauscher's suggestion that the communications may have been put out by a Ball campaign supporter with the campaign's knowledge, Plesha responded "[f]or her to accuse us of being in affiliation with any outside group that would coordinate this type of attack is irresponsible and dangerous." *Id.*

B. The Law

The Federal Election Campaign Act, of 1971, as amended, ("FECA") states that whenever any person makes an expenditure for the purpose of financing a communication expressly advocating the election or defeat of a clearly identified candidate, such communication must state specific information concerning who authorized and paid for the communication.

2 U.S.C. § 441d(a).

2 U.S.C. § 441h provides that no person who is a candidate for federal office or employee or agent of such candidate shall fraudulently misrepresent any committee or organization under his control as speaking or writing for or on behalf of any other candidate or political party on a

matter which is damaging to such other candidate or political party. Section 441h thus imposes liability on employees or agents of the candidate.

The FECA explicitly provides for civil penalties and for various forms of injunctive relief for violations of any of its provisions. See 2 U.S.C. 437g(a)(5)(A) and (B). "[T]he importance of the FECA's reporting and disclosure provisions, [footnote omitted] and the difficulty of proving that violations of them actually deprived the public of information, justify a rule allowing a district court to presume harm to the public from the magnitude or seriousness of the violation of these provisions." *Federal Election Commission v. Furgatch*, 869 F.2d 1256, 1259 (9th Cir. 1989). The Supreme Court has long recognized that calculated falsehood does not enjoy constitutional protection. *Time Inc. v Hill*, 385 U.S. 374, 390 (1969)

The FECA explicitly provides that the Commission may find that violations are knowing and willful. 2 U.S.C. § 437g. The knowing and willful standard requires knowledge that one is violating the law. *Federal Election Commission v. John A. Dramesi for Congress Committee*, 640 F. Supp. 985 (D. N.J. 1986). A knowing and willful violation may be established by "proof that the defendant acted deliberately and with knowledge that the representation was false." *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). An inference of a knowing and willful violation may be drawn "from the defendant's elaborate scheme for disguising" their actions and that they "deliberately conveyed information they knew to be false to the Federal Election Commission." *Id.* at 214-215. "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214, citing *Ingram v. United States*, 360 U.S. 672, 679 (1959).

III. ANALYSIS

A. Overview

The evidence discussed in detail below demonstrates that the Ball campaign financed express advocacy communications without a disclaimer and misrepresented itself as the "East Bay Democratic (or Democrat) Committee" through approximately 40,000 mailings and 10,000 phone calls urging Democrats not to vote for Ellen Tauscher, in violation of Sections 441d(a) and 441h. Although Adrian Plesha explicitly denies any involvement, the evidence indicates Plesha, acting as the Committee's agent, actually spearheaded these efforts. There is evidence that Plesha planned the effort weeks in advance, conveying small pieces of information about it to other campaign staff. The Ball campaign's computers contained drafts of the communications, along with emails of Democratic voters lists sent to Plesha at his request. The Ball campaign stockpiled stamps for the mailing and ordered its printing firm to hide all traces of the transaction. The Ball campaign ordered and financed the "East Bay" phone banks, and attempted to disguise the nature of the calls. Then, after the communications were disseminated, Plesha made statements implicating himself and the campaign. All of this is explained in detail below.

B. Factual Findings

Plesha planned on undertaking these communications at least several weeks prior to when they were disseminated. According to several former campaign staff, as well as the candidate, Plesha worked most closely with finance director Heather Patterson and they often ate lunch together. Patterson states that while lunching together in early October of 1998, Plesha told her that he and Brabender consultant Mike Mihalke had an idea to send a mailer to Democratic voters in California's 10th Congressional district aimed at encouraging them not to vote for Ellen

Tauscher. Plesha said he "was going to use an organization he made up" as the supposed group sending the mailer and indicated that this fictitious group would be a Democratic organization. Patterson expressed concern to Plesha about undertaking such a mailing. She further states that at least a week later, she entered Plesha's office and saw him working on his computer. As Patterson gazed at an open Microsoft Word ("Word") document on his computer screen, Plesha abruptly ordered her out of the office.²

Plesha also briefly discussed this plan with deputy campaign manager, Christian Marchant. Mr. Marchant states that while at dinner one evening in early October of 1998 discussing Mr. Ball's standing in the polls, Plesha said that "he had a few tricks up his sleeve." Plesha specifically used the phrase "suppressing voter turn-out." When questioned further, Plesha refused to provide additional information.

The most powerful evidence of the Ball campaign's involvement in the communications came from its own computer. The investigation uncovered a Ball campaign computer was used to compose the "East Bay Democratic Committee" mailing. The campaign computer formerly assigned to Plesha contained a draft of the "East Bay Democratic Committee" mailing, dated October 23, 1998.³ That is several days before the date on the mailer, November 1, 1998, and the date when the mailer was distributed. The computer also contains a copy of the script for the "East Bay" phone script. The phone bank script, which is essentially a condensed version of the

² Patterson stated that she had routinely visited Plesha's office, and he had never before ordered her out of his office.

³ The theme of the draft mailing is substantially the same as the final version. The draft is more strident in its attack of Ellen Tauscher while in the final version the alleged party committee appears reluctant to abandon Tauscher, suggesting it had no other choice. These changes were apparently made in an attempt to make the mailing appear more authentic.

mailing by the "East Bay Democratic Committee," states:

Hi, I'm calling for the East Bay Democrat Committee, representing all Democrats in the East Bay, to remind you to vote for our Democrat Team on Tuesday. But we are not endorsing Ellen Tauscher for Congress. Ellen voted with Newt Gingrich and the Republican Congress to continue the impeachment process of President Bill Clinton.

We could never support her opponent, but since she did not support our President - we are not supporting her. Thank you. Goodbye.

The campaign computer also contains Democratic voter lists of the persons who received the "East Bay" mailings and phone calls. The voter lists contain the names, addresses and phone numbers of Democratic voters in Alameda and Contra Costa counties, the counties which make up California's 10th Congressional District. The lists include persons who had filed complaints with state authorities about the "East Bay" calls and/or mailings. Deputy Campaign Manager Christian Marchant emailed the voter lists to Adrian Plesha on October 30, 1998. Marchant states that Plesha directed him to retrieve these lists from a database maintained in the Pleasanton campaign office and to forward them to Plesha. The last modification date on these email attachments is October 30, 1998, several hours prior to the last modification date of the "East Bay Democrat Committee" telephone script.

The Ball campaign covertly arranged and financed the East Bay Democratic mailings. While the Ball campaign routinely used postal permits for bulk mailings, to disguise its involvement in the approximately 40,000 piece "East Bay" mailing, it used only first class stamps. Ball campaign records indicate that the campaign stockpiled over 40,000 stamps during the month preceding the "East Bay" mailing. In one instance, the Ball campaign's major printing firm, Steven's Printing, invoiced the Ball campaign for a job order of 3,000 letters (Job #981471 - described as "Mary Bono Invitations"). The Ball campaign's records, however, indicate that it purchased 15,300 stamps for this mailing. In another example, the campaign

purchased 21,050 first class stamps for a mailing, even though the invoice from Steven's Printing indicates that the piece was mailed using a bulk permit number, rather than stamps. (Job #981339 - "Lawrence Livermore Lab Mailing").

The owner of Ireland Direct Mail, Greg Hollman, offered compelling evidence that the Ball campaign was involved in the East Bay mailing, and that it went to great efforts to conceal that involvement. Mr. Hollman acknowledges that several days before election day in November of 1998, the owners of Stevens Printing, Jeff and Steve Clark, asked his company to be prepared to handle a 40,000 piece mailing. Steven's owners told Hollman "you don't want to know anything about [the mailing itself]". Stevens indicated that they did not want any record of the job. Hollman states that they instructed him not to issue an invoice and to accept payment in cash. They further instructed Hollman to return any spoils (mis-printed or damaged mailers) to Steven's Printing. But in late December of 1998 or early January of 1999, both the owners of Stevens and Hollman were concerned about conducting a cash transaction for the 40,000 piece mailing. Therefore, after a discussion between them, Hollman created a fictitious invoice for a "Charles Ball Political Mailing October 1, 1998."

Deputy Campaign Manager Christian Marchant averred that, at Plesha's request, he sent the Democratic voter lists to Steven's Printing. Marchant stated that one of the owners of Steven's Printing, Jeff Clark, telephoned him to confirm that the voter lists were the ones Adrian Plesha wanted used. Marchant further stated that Clark informed him that Plesha wanted #10 white envelopes and "live stamps" used for the mailing.

For the "East Bay" phone bank, the Ball campaign hired Jeff Butzke and his company Direct Impact. Direct Impact and its subcontractor provided this Office with a copy of a script that is identical to the one found on the Ball campaign's computer. The subcontractor also

provided this Office with voter lists which match the lists found on the Ball campaign's computer. Plesha sent the phone script to Butzke via electronic mail message on October 30, 1998, at 11:21 PM eastern time. Plesha's email refers to an attached telephone script. The document is in Word format. The document is entitled "Hi.doc," which contains the first word in the East Bay telephone script.⁴ Mr. Butzke confirmed that the script related to phone bank services that Butzke/Direct Impact arranged for the Ball campaign just prior to election day in November 1998. Butzke further confirmed that the order for the phone bank had to have come from Adrian Plesha. Butzke stated that Plesha was his sole contact with the Ball campaign.

The documentation related to the phone bank shows an effort to conceal the nature of the calls. The invoice describes the phone bank services as "GOTV calls to Republican Men." Butzke stated that Plesha would have told him what to put on the invoice, and that any changes to the telephone script would have been approved by Plesha. The invoice from Butzke/Direct Impact for the phone bank services in question was sent to Adrian Plesha's attention. The campaign paid Direct Impact \$4,500 for the phone bank. The Ball campaign's check register, and its \$4,500 check to Direct Impact, dated November 4, 1998, indicated that it was for "GOTV/GOP Men" According to Mr. Ball, Adrian Plesha signed the check that was issued to Direct Impact and made this entry in the check register.⁵

⁴ In this version of Word, if the author does not provide a title for a document, the default for the title is taken from the beginning of the first line in the document.

⁵ Butzke/Direct Impact hired Jody Novacek and her company Grace-Marie Enterprises to locate a phone bank. Novacek/Grace hired a firm called Milford Marketing to make the phone calls. Milford Marketing provided this Office with documents related to the job, specifically, a copy of the "East Bay" phone script, along with lists of the names, addresses and phone numbers of the voters from the two counties that reported receiving the communications—Contra Costa and Alameda.

Following the dissemination of the communications, Plesha made statements suggesting his involvement. After the "East Bay" mailing received press attention, former campaign staffer Heather Patterson stated that Plesha showed her a copy of it and expressed amusement about it. Christian Marchant stated that Plesha faxed Marchant a copy of the "East Bay" mailing when it first hit the press, and stated "the cavalry has arrived." When Marchant asked where the mailer came from, Plesha replied, "Friends." Moreover, Plesha implicitly conceded his involvement in the mailing. This happened when, after the election, Marchant confronted Plesha about his involvement in the "East Bay" mailing. At that time, Plesha stated: "You were the Deputy Campaign Manager. If you did not know what the lists were for, you were stupid." Through this conversation, Marchant concluded that Plesha was suggesting that he would be implicated as a participant in the mailing if he did not keep quiet about it.

C. Legal Analysis

The investigation uncovered overwhelming evidence that Charles Ball for Congress, acting through its Campaign Manager Adrian Plesha, was responsible for the fraudulent mailing and phone bank put out under the guise of the "East Bay Democratic Committee" and designed to suppress votes for Ellen Tauscher in the 1998 general election.

The communications urged registered Democrats not to vote for Ellen Tauscher, expressly advocating the defeat of a clearly identified candidate. The communications lacked disclaimers required of express advocacy communications in violation of Section 441d.

The communications in question also violated Section 441h. The creators of the communications, a candidate's campaign committee, knowingly made a false representation by pretending to be an official Democratic organization called the "East Bay Democratic Committee" that was "Representing All Democrats in the East Bay." To bolster this deception,

the mailing used the name George Miller, "Chairman" of the local party committee, as the signatory of the letter. George Miller is the well-known Democratic Congressman in a neighboring district-which is also within the area known as the East Bay. The communications were targeted to Democrats and made it appear as if a local Democratic committee and/or a local Democratic leader were advocating abandonment of a Democratic Member of Congress in the recipients' district. Had the recipients known that the Ball campaign, Tauscher's political opponent, sponsored the communications, the message would have been considerably weakened.

The communications were damaging to the Democratic Party and to Representative Tauscher because they conveyed to registered Democrats that a local Democratic committee believed that the nominee had abandoned the party. Moreover, the communications were damaging because they told recipients, who were registered Democrats, not to vote for the Democratic candidate in an election that was just days away. It is evident that the persons responsible for these communications intended to damage the Democratic party and Ellen Tauscher by suppressing votes the candidate might have otherwise received. While the precise amount of harm is immeasurable, there is presumed harm to the public from the magnitude and seriousness of the violations. *Furgatch*, 869 F.2d at 1259. The FECA provides civil penalties and/or other relief for such violations. 2 U.S.C. § 437g(a).

The evidence adduced throughout this investigation demonstrates that the violations involve a knowing and willful scheme to disseminate voter suppression communications that were damaging to an opponent, purposely leaving off a disclaimer stating who paid for and authorized the communications, and a concerted effort to hide all traces of involvement. First, to hide the source of the mailing, stamps and a phony return address were used. Second, the Ball campaign's vendors, acting pursuant to Mr. Plesha's instructions, went to great lengths to hide

any link between these communications and the Ball campaign. All the "spoils" were returned to Steven's Printing to leave no traces of the job. Phony invoices also were created to leave no easily identifiable evidence of the job. And the Ball campaign created a phony description of the phone bank on the campaign's check and check register, i.e. "GOTV/GOP Men." Second, when confronted with the Commission's findings, the Ball campaign's Mr. Plesha submitted a sworn statement absolutely denying any involvement in or knowledge of the communications. Thus, the knowing and willful nature of these violations can also be inferred from the efforts to impede and obstruct this investigation by submitting a false statement under oath.

In light of the evidence at hand, the Office of General Counsel concludes that there is probable cause to believe that the Ball campaign knowingly and willfully violated 2 U.S.C. § 441d(a) by failing to place disclaimers on direct mail and phone bank communications urging the defeat of Ellen Tauscher. There is also probable cause to believe that the Ball campaign knowingly and willfully violated § 441h. In addition, there is probable cause to believe that Justin Briggs, acting as treasurer of the Ball campaign, violated 2 U.S.C. §§ 441d and 441h.

IV. RECOMMENDATIONS

1. Find probable cause to believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. §§ 441d and 441h.

2. Find probable cause to believe that Justin Briggs, acting as treasurer of Charles Ball for Congress, violated 2 U.S.C. §§ 441d and 441h.

9/4/01
Date

Lois G. Lerner
Lois G. Lerner
Acting General Counsel